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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. _____

PAUL DOYLE ARTELL, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PAUL DOYLE ARTELL, Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, rendered in the above case on March 13, 1963. Petitioner's First Motion for Rehearing was overruled without written opinion on April 24, 1963.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are as yet unreported, but copies of the said opinions are attached hereto as Appendix A.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

The state court's opinion is in conflict with the Supreme Court of the United States and the Circuit Courts on a federal question.

Vernon's Annotated Texas Constitution, Art. 5, §§ 1 and 5, provides as follows:

Article 5, § 1

> "Section 1. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Court, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

Article 5, § 5

> "Sec. 5. The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

The legislature of the State of Texas, acting pursuant to the Constitutional mandate provided for appeals in criminal cases by the enactment of the Code of Criminal Procedure of the State of Texas, Art. 53, to-wit:

> "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed

from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

The judgment in this cause became final on April 24, 1963, upon the entry of the judgment overruling the petition for rehearing. The Court of Criminal Appeals of the State of Texas is the highest criminal appellate court in Texas.

The motion for stay of mandate pending presentation of petition for certiorari was denied by the Court of Criminal Appeals of Texas on April 24, 1963; however, said Court delayed the issuance of mandate for thirty (30) days to allow time for presentation of application for stay of mandate to this Honorable Court, which stay was granted. A copy of said order is attached hereto as Appendix B.

The petitioner has exhausted all state remedies.

QUESTIONS PRESENTED

I. Have the provisions of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States been violated where a defendant in a state criminal proceeding was convicted in a state which by statute requires compliance with the Constitution and laws of the United States as to the admissibility of evidence in a criminal case where:

(A) The state relies exclusively for a conviction upon evidence obtained as follows:

(1) The officers arrested the defendant without a warrant or other process;

(2) The officers did not observe the defendant committing any felony, misdemeanor or breach of the peace;

(3) There was no probable cause to arrest the defendant;

(4) The defendant was not attempting to escape;

(5) There was no showing of the application of the emergency rule for the arrest of defendant without a warrant;

(6) The evidence was obtained as a result of the arrest?

(B) The trial court refused to require the state to establish probable cause for the arrest of a suspected person where the only evidence introduced by the state was acquired as a result of the arrest in question?

(C) The highest appellate court of the State of Texas held that it was not a violation of the Constitution and laws of the United States to allow evidence to be introduced over the defendant's objections where there was no warrant of arrest and no probable cause for the arrest in question and the state courts of Texas refused to consider the issue of probable cause?

II. Do the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States require a showing of probable cause as a condition precedent to the admissibility of evidence in a state criminal proceeding where the only evidence introduced reflected that it had been obtained contrary to the Constitution and laws of the United States?

III.—Can the issue of probable cause be delegated to the executive branch of the government, or is it a judicial function?

IV. Has the accused been denied effective assistance of counsel where:

(A) Hearsay evidence was utilized by the state over the defendant's objections?

(B) Information from the informer was the only fact relied upon by the State to establish probable cause for the arrest and search of the petitioner?

(C) The trial court denied petitioner his Constitutional right to full and complete cross-examination of witnesses who testified against him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner relies upon the due process of law and the equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States and the Fourth, Fifth and Sixth Amendments to the Constitution of the United States; Article 1, Sec. 9 of the Constitution of Texas; Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure and Art. 727a, *Vernon's Annotated Code of Criminal Procedure of Texas:*

Amendment 4—Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized."

Amendment 5—Constitution of the United States

"No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life; liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6—Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment 14—Constitution of the United States

Section (1). "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Constitution, Article 1, Section 9

"The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Rule 3—Federal Rules of Criminal Procedure

THE COMPLAINT

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4—Federal Rules of Criminal Procedure

WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the Defendant has committed it, a warrant for the arrest of the Defendant shall issue to any officer authorized by law to execute it. Upon the request of the Attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It

shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal of by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before

whom the defendant is brought pursuant to Rule 5. At the request of the Attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

Rule 41—Federal Rules of Criminal Procedure

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or

hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

> Vernon's Annotated Code of Criminal Procedure of Texas Art. 727a.
>
> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case." As amended Acts 1953, 53rd Leg., p. 669, ch. 253, § 1.

STATEMENT OF THE CASE

I. *Procedural History of the Case*

The petitioner was charged in County Criminal Court at Law No. One of Harris County, Texas with a violation of Art. 483, Vernon's Annotated Penal Code of Texas which provides that it is a criminal offense to carry on or about one's person a pistol. Trial was had on August 27, 1962, before the court. The petitioner was found guilty and his punishment was fixed by the court at sixty (60) days confinement in the Harris County Jail. The petitioner gave notice of appeal to the Court of Criminal Appeals of Texas, the highest criminal appellate court in the State of Texas, and on March 13, 1963, the Court of Criminal Appeals of Texas affirmed the decision with one judge dissenting. A motion for rehearing was timely filed, considered by the court and overruled without a written opinion on April 24, 1963. These opinions are as yet unreported but may be found as Appendix A. The petitioner has no further remedy for appellate relief in the State of Texas.

II. *Facts Material To The Questions Presented*

The state's evidence consisted of the testimony of one witness against the petitioner on the trial of this case on its merits. Said witness, Officer R. Y. Garcia, Houston Police Officer assigned to the narcotic division, testified that he had observed the petitioner on the 22nd day of May, 1962, at approximately 5:15 P. M. in the 1600 Block of Houston Avenue in a 1960 green Chevrolent license number SR 6700 (R. 2-3).

Over the objection of the petitioner, the witness testified that his reason for being in that area on said date was that he had received information from a reliable and credible person to the effect that the petitioner would be in the 1600 block of Houston Avenue in his 1960 green Chevrolet, License number SR 6700 and he would have a quantity of narcotics in his possession. The petitioner timely objected to this testimony due to the fact that this was hearsay on the part of the officer and also a conclusion as to the reliability and credibility of the informant. The court overruled the objection, to which the petitioner excepted (R. 4).

The witness testified that he believed the information to be true and correct; however, the factual basis for this belief was not shown. The petitioner attempted to determine the identity of the informer and the factual basis for the conclusion of the officer that the informer was a credible and reliable person (R. 4-6). The court overruled the petitioner's objections and further refused to allow the petitioner to determine the identity of the informer for the limited purpose of preserving the Bill of Exceptions showing the absence of probable cause (R. 7). The officer testi-

fied that the "tip" was received by a police officer over the telephone (R. 7). The petitioner then attempted to determine whether the witness knew the name of the informer. The state objected and the court sustained the objection. The petitioner excepted to the ruling of the court and the court refused to allow petitioner to prepare his Bill of Exceptions (R. 8).

The witness testified he was accompanied by four police officers and they proceeded directly to the 1600 block of Houston Avenue and observed the petitioner seated in his automobile alone. It was daylight and as the witness walked to the driver's side of the car he observed the petitioner reaching under the front seat directly beneath him. The witness identified himself as a police officer and proceeded to search the automobile and defendant (R. 5).

The petitioner timely objected and excepted to the testimony as to evidence secured as a result of the search as the officers had not shown probable cause for the search of the vehicle and the arrest of the petitioner. Petitioner further objected to the fruits of the search or any testimony concerning said search until the state had shown probable cause for the arrest and search of the petitioner and the search of the vehicle (R. 6).

The witness testified that there was no arrest or search warrant for the petitioner; that he did not see the petitioner committing any violation of the law in his presence; that the petitioner did not appear to be attempting to escape (R. 5-6); that the motor of the car was stopped and that there were no narcotics found as a result of the search of the vehicle (R. 17-20).

Over the timely objection of the petitioner (R. 9), the witness testified that he searched the vehicle and found a

.38 caliber Smith & Wesson pistol and that he did not find any narcotics. The revolver was introduced in evidence, together with the ammunition and holster (R. 10-11), all of which evidence had been taken to the homicide division and an offense report prepared by Officer Strickland.

The witness read the offense report two weeks prior to the trial of August 27, 1962 and he stated he was testifying from a refreshed memory at the time of trial. The petitioner made a motion to the court to order the assistant district attorney to produce the offense report in order that the witness might be cross-examined on the report which the witness had utilized (R. 15). The court denied the motion, to which defendant excepted; thereafter, the state objected to the production of the offense report for the reason that the witness himself did not prepare the report but had only utilized same to refresh his memory and to testify. This petitioner was denied the right to attach the offense report to his Bill of Exceptions (R. 16).

The petitioner made a motion for an instructed verdict for the reason that the state had not shown probable cause for the arrest and search of the defendant or his automobile; there was no showing by the state of any process that would justify the arrest and search in question; there was no showing of any legal means used by the state in effecting this search; the search was made without the provisions of the law having been satisfied, and particularly for the reason that the search was made in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, Art. 1, Section 9 of the Constitution of Texas, Article 727a, Code of Criminal Procedure of Texas and the cases interpreting these particular provisions.

The petitioner particularly brought to the court's attention the case of *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081.

III. *Federal Questions Raised In The Trial Court Below And In The Court Of Criminal Appeals Of Texas*

(A) IN THE TRIAL COURT

The petitioner objected to the introduction of the evidence on the ground that there was no probable cause for the arrest of the petitioner and search of the vehicle in question where the officers did not have an arrest or search warrant and there was no probable cause shown for an arrest or search without process, to-wit: that the petitioner was about to escape or that he had committed a felony. Petitioner contended that the court was the proper party to pass on the issue of probable cause, rather than the police officer; and in view of the fact that the state had not shown to the court probable cause, the evidence or any fruits of the search were inadmissible against the petitioner until the state had shown the court probable cause, as distinguished from the suspicion of the arresting officer based on hearsay declaration of an unidentified third party.

The petitioner further contended that: The evidence was inadmissible under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States as these amendments are interpreted by the Supreme Court of the United States in the case of *Mapp v. Ohio*, supra, and the Sixth Amendment to the Constitution (R. 13); the petitioner was deprived of equal protection of the law and effective assistance of counsel in the refusal of the court to allow the petitioner to go into

the facts concerning probable cause and for the reason that Art. 727a of the Code of Criminal Procedure of Texas provides that any evidence that is obtained in violation of the Constitution or laws of the United States or the Constitution or laws of the State of Texas shall not be admissible in a criminal proceeding against a defendant. The court overruled all of these objections and exceptions (R. 13). After the state had rested, the petitioner again moved for an instructed verdict and raised the questions concerning the arrest and search of the petitioner which he had previously raised to the admissibility of the evidence against the petitioner, to-wit: there had been no showing of probable cause or justification of the arrest or search of the petitioner and his vehicle and said search was a violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States. The Court summarily overruled this motion for an instructed verdict and found petitioner guilty of illegally carrying on or about his person a pistol.

(B) THE COURT OF CRIMINAL APPEALS OF TEXAS

Under the laws governing appeals in criminal cases from inferior courts to the Court of Criminal Appeals of Texas, the party taking the appeal must file a statement of facts. The statement of facts, a copy of which is filed with this Honorable Court, was filed and considered by the Court of Criminal Appeals of Texas. The petitioner briefed, presented and argued four points in the Court of Criminal Appeals, said questions were based on the identical questions before this Honorable Court, to-wit:

First Point — The trial court committed error in admitting evidence which had been obtained in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Second Point — The state had not shown probable cause for the arrest of the petitioner without process of any kind and the issue of probable cause is a judicial function and the refusal of the trial court to rule on the issue of probable cause was a denial to him of his rights under the Constitution of the State of Texas and Art. 727a Code of Criminal Procedure of Texas and the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

Third Point — The petitioner further urged the Court of Criminal Appeals of Texas that the trial court erred in preventing the petitioner from ascertaining the identity of the informer under the facts as they had developed in the trial court.

Fourth Point — The petitioner was denied a fair trial when the state was allowed to introduce evidence from a witness who had testified from a refreshed memory based on an offense report without the petitioner being given the right to cross-examine said witness and the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Court of Criminal Appeals did not discuss the federal questions, with the exception of the non-production of the offense report by the state; however, the court did cite *Palermo v. United States*, 360 U.S. 643, 3 L. Ed. 2d 1287.

ARGUMENT UNDER FIRST QUESTION

The application of the doctrine of *Mapp v. Ohio*, 367 U.S. 643, is extremely uncertain at this time. This fact is evidenced by the number of petitions for certiorari presented to this Honorable Court since the Mapp decision which question the application of the doctrine to the various states. The extent of the disagreement between the various states as to the application of the Mapp decision is demonstrated by the concurring opinion of Associate Justice Goldberg in the case of *Cleary v. Bolger*, 31 Law Week 4102, decided January 13, 1963, wherein it appears that the Mapp doctrine should exclude "all of the fruits of the poisonous tree" as evidence. This rationale was followed in the Court of Appeals of New York in *People v. Rodriguez*, 229 N.Y.S. 2d 353, 357.

The Court of Criminal Appeals of the States of Texas, although by statute required to exclude any evidence obtained in violation of the laws or the Constitution of the United States, does nothing more than give lip service to any of the decisions of the Supreme Court of the United States; see: *Pete Giacona v. State of Texas*, No. 34930, which is presently pending in this Honorable Court for certiorari, filed on April 29, 1963, styled: *Giacona v. Texas*, 1440 Miscellaneous, October Term, 1962.

For the benefit of the state's judiciary and for the protection of the Federal Constitutional rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constition of the United States, as these Amendments control in a state criminal proceeding, this Honorable Court should spell out and amplify the doctrine of *Mapp v. Ohio* in order to avoid the needless conflict between state and federal courts in the application of the Mapp doctrine.

The circuitous misapplication by the Court of Criminal Appeals of Texas in considering the application of the Mapp Doctrine is so extremely unique that it virtually demands a review by the Supreme Court of the United States. In essence the Court of Criminal Appeals holds that the rationale of the Mapp Doctrine, as well as the substantive and procedural laws of the United States, are binding and controlling in Texas due to the fact that the state courts of Texas are required to observe the exclusionary rule, as that rule was interpreted by the Court of Criminal Appeals pre-Mapp (See, *Nick Alford Aguilar v. The State of Texas*, No. 1119 Miscellaneous, docketed February 25, 1963). The Court of Criminal Appeals, while stating that the federal decisions are controlling and are followed in the State of Texas, in fact completely ignore the substance and holding of these very decisions.

It appears that we have three exclusionary rules in the United States, rather than two, to-wit:

1. The exclusionary rule required by the Constitution and laws of the United States (*Mapp v. Ohio*, supra,) which said ruling is followed conscientiously in some states, to-wit: New York;

2. The exclusionary rule employed by states which did not have the exclusionary rule pre-Mapp; and—

3. The modified circuitous post-Mapp doctrine of Texas, wherein the Court of Criminal Appeals, the highest criminal appellate court of the State of Texas, agrees that the Federal Constitution and laws are binding substantively and procedurally in Texas; however, the Court of Criminal Appeals without

reluctance makes an independent evaluation of the substantive requirements of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

As construed by the Court of Criminal Appeals of Texas, these Federal Constitutional requirements do not include:

The right of privacy (See, *Giacona v. Texas*, No. 1440, Misc., docketed February 29, 1963).

A confession obtained as a result of an illegal arrest and detention in violation of Rule 5a of the F.R.C.P. and Art. 217, Vernon's Annotated Code of Criminal Procedure is admissible (See, *Lopez v. State*, 288 S.W. 2d 64; *Childress v. State*, 312 S.W. 2d 247).

An invitee on the premises may not complain of an illegal search and the evidence introduced as a result of the illegal search against an invitee is not contrary to the Constitution and laws of the United States; (See, *Willie Stevenson v. State*, 334 S.W. 2d 814) notwithstanding the holding of the Supreme Court of the United States in *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697. The Court of Criminal Appeals resolves this obvious conflict in the interpretation of the laws and Constitution of the United States as follows:

"We are not unmindful of the recent decisions of the United States Supreme Court holding that under Rule 41(e) Federal Rules of Criminal Procedure, 18 U.S.C.A. anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed

to be used against him. Jones v. United States, 80 S. Ct. 725.

"The rule so announced is not here controlling, both because motions to supress are foreign to our procedure, and because the record does not show that the entry of the apartment by the officers without a search warrant was unlawful. So far as the record before us shows, the officers may have themselves been invitees." *Willie Stevenson v. State* at 815.

In the *Stevenson* case, the Court of Criminal Appeals circumvents the Supreme Court decision by stating that a motion to suppress was utilized and authorized by Rule 41(e), F.R.C.P. and due to the fact that Texas does not have a motion to suppress, but only requires an objection to be made at the time the evidence is attempted to be introduced against a defendant in a criminal case; said decision is not controlling.

In the event the foregoing interpretation might be deemed insufficient as an independent state ground, the Court of Criminal Appeals utilized the expediency of making a factual ambiguity to completely circumvent the *Jones* decision. The Court of Criminal Appeals of Texas went one step further in the *Stevenson* case, supra, and held that the facts of the *Stevenson* case did not show that the entry of the apartment by the officers without a warrant was unlawful; notwithstanding the fact that there was no search warrant; no arrest warrant; no showing of probable cause for the search; that the officers were trespassing, and the only individual with the officers was a party who did not live on the premises; had no possessory interest of any kind in the premises; was sitting in the car handcuffed and under guard when

the officers proceeded up the steps of the garage apartment, forcibly jerked open the door and for the first time observed what they thought to be marijuana while inside the apartment.

If the various state courts can circumvent the holding of *Mapp v. Ohio*, supra, by merely insisting that the particular states do not recognize the procedural device of suppression of evidence authorized by Rule 41(e), F.R.C.P., then *Mapp v. Ohio* as an expression of the rights of free men has suffered an untimely demise.

ARGUMENT UNDER SECOND AND THIRD QUESTIONS

Certiorari should be granted due to the national importance of the question involved in the procedural application of the Mapp Doctrine in the instant case where the State of Texas has utilized the state procedural device in a manner that destroys the substantive protection of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United State.

In order for the individuals of the particular states to receive the protection guaranteed by the 4th, 5th and 14th Amendments to the Constitution of the United States as interpreted by the Supreme Court of the United States, it is necessary for the particular states to have some procedure whereby the issue of probable cause for the arrest and search of an individual and the invasion of his right of privacy be considered by the judiciary, rather than by the executive branch of the government.

The enforcement of the Fourth, Fifth and Fourteenth Amendments is the peculiar province of the judiciary,

Weeks v. United States, 232 U.S. 383, 53 L. Ed. 652, 34 S. Ct. 341; L.R.A. 1915b 834, Ann. Cas. 1915c 1177 and *Beisel: Control Over Illegal Enforement of Criminal Law, The Role of the Supreme Court*, Vol. 34, No. 4; Vol. 35, No. 1; Boston University Law Review; *Johnson v. United States*, 333 U.S. 10, 92 L. Ed. 436; *Giordenello v. United States*, 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245.

The decision in the *Giordenello* case, supra, is controlling herein. This Honorable Court in construing the Fourth Amendment held that the provisions of Rule 3 and 4 of the F.R.C.P. when read in the light of Constitutional requirements they implement apply to arrest, as well as search warrants, citing *Ex parte Burford* 3 Cranch 448, 2 L. Ed. 459; *McGrain v. Daugherty*, 273 U.S. 135, 71 L. Ed. 580, 584, 586, 47 S. Ct. 319, 50 A.L.R. 1.

> "The protection afforded by these rules when they are viewed against their Constitutional background, is that the inferences from the facts which lead to the complaint . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime.

The Court further held:

> "The commissioner must judge for himself the pursuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

The Court further held: *Giordenello v. United States*, 2 L. Ed. 2d 1510,

> "If the court or commissioner relies upon the hearsay of the complainant, where the complainant himself had no personal knowledge, that would be error . . . In these circumstances it is difficult to understand how the commissioner could be expected to assess independently the probability that the petitioner committed the crime charged. Indeed, if this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance entitled to perfunctory approval by the commissioner. This would not comport with the protective purposes which a complaint is designed to achieve."

In the instant case we have the state court's approval of the very procedure denounced in Giordenello, and in addition thereto, we have the state court delegating the non-delegatable function of making the determination of probable cause to the executive branch of the government. The courts of Texas categorically refuse to consider the issue of probable cause.

The Fourth Circuit Court of Appeals in the case of *United States v. Peisner and Dishman*, 311 F. 2d 94, held that:

> "The standard of probable cause to support search without a warrant is no less stringent than the standard of probable cause required to support the issuance of search warrant."

The Fourth Circuit further observed in the *Peisner* case that:

"Every search and seizure made without a warrant and absent consent of one in position to give consent is prima facie unreasonable unless and until there is a clear showing that prior to the search the officer had good reason to believe that property properly classified as contraband was contained in place to be searched . . . as stated in *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 172, 4 L. Ed. 134. The fact that the suspects were in an automobile was not enough, notwithstanding the liberalized rule governing search when a vehicle is involved, the government must still prove probable cause. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; *Ray v. United States*, 255 F. 2d 473."

The issue of probable cause was considered by this Honorable Court in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543. Determination of probable cause is not an executive function. It is the duty of the trial court to inquire as to the probable cause and to require a showing of probable cause as a condition precedent to the admissibility of evidence in a state criminal proceeding.

The Sixth Circuit Court of Appeals suggests that the attempted delegation of the duty to determine probable cause to the executive branch, to-wit: the police, operated to defeat the jurisdiction of the commissioner to issue a warrant. *Worthington v. United States*, 166 F. 2d 577; *Giles v. United States*, 284 F. 208.

ARGUMENT UNDER FOURTH QUESTION

Certiorari should be granted due to the importance of the question of the Application of the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the

United States as they apply to the states in a factual circumstance wherein a conviction was obtained by the state by allowing the state to introduce hearsay evidence which deprived the defendant of confrontation and in applying an erroneous standard to a Federal statute, to-wit: Title 18 Sec. 3500.

The petitioner was denied the right of confrontation, cross-examination and effective assistance of counsel, which made the conviction a violation of equal protection of the law and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. In essence herein the petitioner submits that the Fourth, Fifth, Sixth and Fourteenth Amendments in this particular area are so interwoven that in any criminal prosecution wherein a defendant is denied any such rights guaranteed by the Constitution of the United States, that of necessity the very denial of these Federal Constitutional rights operate to deny him effective assistance of counsel; therefore, the Court should grant certiorari to review the denial of effective assistance of counsel as revealed in the Statement of the Nature of the Case and the Arguments under Questions 1 and 2.

WHEREFORE, Petitioner prays that the judgment, verdict and sentence imposed on the petitioner in Cause No. 167,338 in County Criminal Court at Law No. One of Harris County, Texas entered on August 27, 1962, and affirmed by the Court of Criminal Appeals of the State of Texas in Cause No. 35,418 be set aside, vacated and held for naught; that the Petitioner's writ of certiorari be granted and the judgment and sentence together with the order of affirmance in Cause No. 35,418 be reversed and that this Honorable Court issue said writ to the Court

of Criminal Appeals of Texas as herein prayed for by Petitioner.

Respectfully submitted,

CLYDE W. WOODY
Attorney for Petitioner
1114 Texas Avenue Building
Houston 2, Texas
CA 2-9225

CERTIFICATE OF PROOF OF SERVICE

I, Clyde W. Woody, the undersigned attorney, for Petitioner in the above styled cause, hereby certify that on this the ____ day of July, A.D. 1963, I served a copy of the above Petition for Writ of Certiorari upon the Honorable Waggoner Carr, Attorney General for the State of Texas, by depositing an envelope containing such copy in the United States mail at a United States Post Office in Houston, Harris County, Texas, with sufficient first-class-certified mail- postage prepaid and affixed thereto, addressed to him at his office in the State Capitol Building at Capitol Station, Austin, Texas.

CLYDE W. WOODY

APPENDIX "A"

Paul Doyle Artell, Appellant

No. 35,418, v. - - - Appeal from Harris County

The State of Texas, Appellee

OPINION

The offense is carrying a pistol; the punishment, 60 days in jail.

Officer Garcia of the narcotics division of the Houston police testified that on the day in question he received information by telephone from a reliable and credible person that appellant could be found in the 1600 block of Houston Avenue in a 1960 green Chevrolet, license number SR 6700, and that he had a quantity of narcotics in his possession; that he, in company with Officer Strickland and others, proceeded at once to said location, and as he approached the automobile which had been described to him he observed appellant, who was seated therein alone, "reaching under the front seat directly behind him." He identified himself as an officer, reached under the seat and pulled out a black holster that contained a .38 caliber Smith & Wesson revolver. Appellant was then carried to the station, and Officer Strickland took charge of the weapon and made out the offense report. Appellant did not testify or offer any evidence in his own behalf, and we find the evidence sufficient to support the conviction.

Appellant's attack upon the legality of the search is overruled upon authority of French v. State, 284 S.W. 2d 339; Sanders v. State, 312 S.W. 2d 640; Slaughter v. State, 314 S.W. 2d 92; Bridges v. State, 316 S.W. 2d 757; Baray

v. State, 321 S.W. 2d 87; McCall v. State, 322 S.W. 2d 291; and Leal v. State, 332 S.W. 2d 729.

The court did not err in declining to require Officer Garcia to name his informer. Bridges v. State, supra, and Sikes v. State, 334 S.W. 2d 440. This is especially so since there is no showing that the informant took any material part in bringing about the offense, was present when it occurred or might be a material witness as to whether or not accused committed the offense. Anno. 76 A.L.R. 2d 262, sec. 20, p. 307.

The sole remaining question which requires discussion is the refusal of the trial court to permit appellant to make Officer Strickland's offense report which Officer Garcia had read some time before the trial and from which he had refreshed his memory available for the purpose of cross-examining Garcia or for the purpose of perfecting his bill of exception. This Court has recently in Gaskin v. State, 353 S.W. 2d 467; Martinez v. State, 354 S.W. 2d 936; and Pruitt v. State, 355 S.W. 2d 528, made what we consider wholesome progress in protecting the rights of an accused. We have been cited no case, nor has an exhaustive inquiry revealed one, which requires that a report made by a person other than the witness be made available under the rule set forth above.

We are not inclined at this juncture to expand the rule, especially in view of the relatively recent expression of the Supreme Court of the United States in Palermo v. U. S., 360 U.S. 343, 3 L. ed. 1267, 79 S. Ct. 1217, on a similar problem, as follows:

> "It is clear that Congress was concerned that only those statements which could properly be called the

witness' own words should be made available to the defense for purposes of impeachment."

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Judge

(Delivered March 13, 1963)

Paul Doyle Artell, Appellant

No. 35,418. v. - - - Appeal from Harris County

The State of Texas, Appellee

DISSENTING OPINION

I disagree with the majority opinion in their holding that the trial court did not commit error in refusing to permit appellant to examine the offense report for the purpose of cross-examining Officer Garcia or for the purpose of perfecting his bill of exception.

It seems clear to me that when the trial court refuses to direct a prosecutor to produce a memorandum or writing which a State's witness has used to refresh his recollection, and make same available to the appellant's counsel, that the right of adequate cross-examination is seriously impaired. The prime objective of cross-examination is to either attempt to impeach or to test the credibility of a witness.

In a case like the one at bar, when it is apparent from the testimony that the witness is today testifying to information obtained by him two weeks ago to refresh his memory, he has definitely placed the instrument in issue,

whether he produces it in court physically or not. Officer Garcia was asked: "Two weeks ago you say you read the offense report." "Yes, sir, approximately two weeks ago," he responded. He was then asked: "And you are testifyng from that refreshed memory today?" He replied: "Yes, sir, I am." Officer Garcia did testify that Officer Strickland made the report, and he had no part in it himself. Yet Garcia's testimony reflects that he and Officer Strickland were together with some other officers at the time of the arrest. It is my thought that this testimony of Officer Garcia was inadmissible for the reason that the offense report was hearsay as to him. Yet the court allowed this officer to testify and adduce testimony based upon a refreshed recollection from a hearsay offense report, which the court refused to direct the district attorney to make available to appellant's counsel. Appellant's counsel was not given the right or opportunity to explore or test the memory of Officer Garcia. I think the rule has been correctly stated by this Court in Erwin v. State, 350 S.W. 2d 199, wherein we said: "The right to see a document or writing does not obtain when it is not used by the State before the jury in some way so as to make its contents *an issue*." In this case, the document might not have been physically present before the jury, but it definitely became an issue before them by virtue of having been used two weeks previous to refresh the recollection of the witness. The witness based his testimony upon this document.

From what I have said, it is vividly clear that I would reverse the case. I respectfully dissent.

McDonald, Judge

(Delivered March 13, 1963)

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 35,418

PAUL DOYLE ARTELL, Appellant

vs. - - - Appeal from Harris County

THE STATE OF TEXAS, Appellee

AFFIRMED
OPINION BY JUDGE MORRISON
DISSENTING OPINION BY JUDGE McDONALD
MARCH 13, 1963

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

APPENDIX B

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

PAUL DOYLE ARTELL, Appellant

v. No. 35,418

THE STATE OF TEXAS, Appellee

ORDER

Motion for stay of mandate pending presentation of petition for certiorari is denied.

Issuance of mandate will be delayed for 30 days to allow time for presentation of application for stay of mandate to the Supreme Court.

K. K. WOODLEY, Presiding Judge
W. A. MORRISON, Judge
W. T. McDONALD, Judge

April 24, 1963

Filed:
April 24, 1963
Court of Criminal Appeals
Austin, Texas
Glenn Haynes, Clerk